No.
01-1886

Supreme Court U.S.
FILED
AUG 12 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HELEN EDWARDS,
CHRISTOPHER EDWARDS,
Petitioners,

v.

ACADIA REALTY TRUST, INC.,
WELLS FARGO GUARD SERVICE, INC.
OF FLORIDA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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42 U.S.C. § 1981 . . . . . *passim*

42 U.S.C. § 1983 . . . . . *passim*

Statement of Facts

Respondents make several erroneous or misleading statements regarding the facts of this case that should not be left unchallenged. For instance, Respondents state: "Petitioners did not observe a security guard approach the white children and admitted that the security guard may have escorted these children out of the Mall that evening, but may not have witnessed it." However, no evidence was adduced that the security guards did eject white children, even though the evidence shows that the security guards had ample reason and opportunity to do so. Moreover, the evidence is that the security guards were present when the white children were unaccompanied and violating mall policy, and that the guards did nothing at the time to remove the children. (R4-111-106:6-13, 192:2-12; R8-230-1-2; R8-231-1-2; R4-101-2; R4-102-2; R1-2-2.) Thus, because the key issue regarding the Edwardses' retaliation claims is whether or not the Edwardses had a reasonable, good faith belief that they were opposing unlawful racial discrimination, the evidence of the security guards' lack of action against the white children actually supports the Edwardses' claims.

Acadia's sequence of events is backwards because the evidence shows that Bankowski replied that he did not care and that the girls needed to get their "black asses" out of there after the Edwardses had been sitting on the bench for several minutes and after the Edwardses witnessed Bankowski's brusque interaction with the black boys. (R4-108-66:3-67:1; R4-111-44:20-46:20; R4-111-203:15-25.) Furthermore, it is the subsequent racist conduct by Bankowski with the black girls (and the lack of Bankowski's interaction with white children) that caused the Edwardses to realize that Bankowski probably had been acting rudely and brusquely towards the black boys because of race, and not for any nonracist reason as first assumed

by the Edwardses. (R4-112-167,168.) Moreover, the Edwardses witnessed the guards interact twice with the black girls, in one instance stalking the girls around a store and out into the common area of the mall insinuating that they were watching the girls because they thought the girls would steal something. (R4-111-60-62.)

Acadia also alleges that the police officers performed an investigation before issuing the trespass to Mr. Edwards. However, the evidence shows that the police spoke to the Edwardses only to warn the Edwardses to leave and not to return for two years and not to complain to the NAACP about the matter. (R4-109-135,148.) Moreover, the evidence shows that the police actually refused to conduct any investigation, telling the Edwardses that the police had to do whatever the property owner wanted them to do and ignoring the Edwardses' pleas to confirm the Edwardses' story by speaking to the black girls standing nearby. (R4-109-133-138; R4-11-84-86.)

Acadia also asserts that a trespass warning was issued to Mrs. Edwards, not Mr. Edwards. However, the record includes a copy of the "trespass after warning" citation issued to Mr. Edwards that night at the Mall (not Mrs. Edwards) (R4-109-144, Def. Ex. 2); and, the testimonial and other evidence shows that both Mrs. and Mr. Edwards were ejected from the Mall that night and banished from the Mall for two years thereafter. (R4-109-133-138.)

Wells Fargo states: "Mr. Bankowski called the Titusville Police Department and requested that a trespass warning be issued to the Edwards because they were interfering with his duties as a security guard and yelling at him." However, Mr. Bankowski admitted that he called the police to trespass the Edwardses because Mrs. Edwards would not listen to his side of the story. (R4-105-8-10.) Also, substantial evidence exists, which must be taken in the Edwardses' favor, that Mrs.

Edwards never yelled at Bankowski or anyone else in the Mall. (R4-122-36,37.) Moreover, the undisputed evidence shows that Mr. Edwards never yelled and that he spoke only once to quietly and calmly establish that Bankowski would not strike Mrs. Edwards with the club-like flashlight. (R4-108-93-102.)

Acadia states: "Mrs. Edwards testified that neither she nor her family had any other encounter with the Mall security before November 20, 1998 except on one occasion following the incident." However, the evidence shows that Mr. Edwards was concerned at the time that his dark-skinned nephew was being singled out for adverse attention because of the nephew's dark skin color. (R8-230-2,3.)

Wells Fargo states: "Dr. Perez did not have the opportunity to observe the security guards ask any other children to leave the Mall that evening." However, the important point is that the evidence shows that Dr. Perez, like the Edwardses, had ample opportunity to see white children escorted out of the Mall had the security guards done so while Dr. Perez was in the Mall, but the security guards confronted, stalked, harassed, and ejected only black children, even though the security guards had ample opportunity and reason to escort or eject white children.

Respondents assert that Bankowski escorted the black girls out of the mall because it was safer to wait outside. However, it boarders on the inane to assert that a group of children are safer waiting for their parents outside of a mall at night than they would be inside the mall where many witnesses could see if they were to be abducted or accosted. Additionally, Acadia asserts that Bankowski escorted the children out because most parents want to pick up there children outside of the mall. However, in this instance, Mr. Bankowski knew that the girls' mother wanted them to wait for her

inside the mall and he said that he didn't care. (R4-108-57.)

Acadia also asserts that "Mrs. Hardy believed that Mr. Bankowski had the legal right to exclude her from the Mall for interfering with his duties as a security officer." However, when Mr. Edwards and friends of the Edwardses tried on at least two occasions to explain to Hardy that the trespass was in retaliation for protesting racial discrimination, Hardy said she didn't care, she would support the security guard's decision, and the Edwardses would have to write a letter of apology before they would be allowed to return to the mall. (R4-112-128:9-129:10; R4-103-8:2-10,79:15-80:25, 86:21-87:5; R4-101-4, Par. 29; R4-102-4, Par. 29; R4-109-179:16-180:6.) Additionally, although Acadia points out that the trespass order was eventually rescinded, it was not rescinded while Acadia owned the mall, and it was not rescinded until after this lawsuit was filed and after Defendants failed or refused to rescind the order after at least two prior requests. (R4-100-4, Composite Exhibit 6 to Notice of Filing Evidence in Support of Motion for Summary Judgment; R4-101-4, Par. 31; R4-102-4, Par. 31.)

Acadia also asserts that the Titusville police department's practice was that a police officer has the discretion to refuse to trespass an individual if the officer believes the trespass warning has an unlawful basis. However, the evidence shows that the police officers told the Edwardses that they did not have discretion not to issue the trespass warning, saying to the Edwardses that they were required to issue a trespass warning at the proprietor's request. (R4-109-133-135.)

Within its Argument, Acadia also asserts that there is no record evidence that the Edwardses were trespassed "based upon any discriminatory motive on the part of Respondent." However, as explained further below, because this case regards a

retaliation claim, the Edwardses are not required to show that they suffered racial discrimination. Instead, they must show that they suffered retaliation for opposing racial discrimination. This evidence is present in the record with respect to the timing of Bankowski's threat to trespass the Edwardses -- immediately after Mrs. Edwards objected to Bankowski's racially discriminatory conduct. (R4-108-99=101.) Additionally, Bankowski himself admitted that he trespassed the Edwardses because Mrs. Edwards would not listen to his explanation (about why he discriminated against the black children), and that he was angered by her accusations of racism. (R4-105-8-10.) Thus, Acadia's conclusory statement that no evidence shows the discriminatory intent is not consistent with the record.

Argument and Authorities

Petitioners rely on their Petition For Writ Of Certiorari to adequately refute most of the factual and legal statements made by Respondents in their Answer briefs. However, some arguments made by Respondents cannot be allowed to go unanswered.

I. ACADIA MISINTERPRETS THE BASIS FOR THE SECTION 1981 CLAIM AND CITES TO ELEMENTS THAT ARE IRRELEVANT TO THIS CASE.

Acadia attempts to confuse this Court with citations to cases stating the elements for a claim for discrimination under 42 U.S.C. § 1981. However, this case is a claim for retaliation for opposing racial discrimination. Claims for retaliation for opposing racial discrimination have different elements than do claims for discrimination. Acadia cites to cases holding that claims for racial discrimination under 42 U.S.C. §

1981 require a showing of intentional discrimination. While these cases may be good law, they are irrelevant to the case at bar, where the Petitioners are not making claims for racial discrimination under § 1981. Rather, Petitioners' claims are for retaliation for opposing racial discrimination under 42 U.S.C. § 1981.

The real issue in this case, and the issue for which this Court should grant certiorari review, is whether a plaintiff making a § 1981 retaliation claim is required to prove the underlying discrimination, or whether, as in Section 1981 and Title VII retaliation cases in the employment context, a reasonable, good faith belief that the underlying discrimination occurred is sufficient to support the claim.[1]

Acadia also attempts to mislead this Court by citing the case of *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), for the proposition that "the mere utterance of an ethnic or racial epithet which engenders offensive feelings" does not support a claim for intentional discrimination under §1981. However, the *Henson* case actually deals with a claim for a racially hostile work environment, which usually would require more than one instance of racial hostility to prove the entire work environment was racially hostile. Additionally, again, the *Henson* case deals with racial discrimination, not retaliation.

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[1]Petitioners maintain that they submitted more than enough evidence to allow the jury to decide that the underlying discrimination did occur.

II. RESPONDENTS WERE STATE ACTORS FOR THE PURPOSES OF THE CLAIMS BROUGHT UNDER SECTION 1983; HOWEVER, IF DEFENDANTS ARE NOT STATE ACTORS, SECTION 1981 STILL APPLIES WITHOUT REFERENCE TO CUSTOM OR POLICY.

Acadia argues that it was not a state actor. However, both Respondents fail to deal with or even acknowledge that claims under § 1981 do not require proof of state action. Thus, as to the § 1981 claim, the issues of whether respondents were state actors, and, if so, whether they had a policy, custom, or practice that led to the violation of Petitioners' rights are not necessary to the claim under 42 U.S.C. §1981. Furthermore, with respect to claims made under 42 U.S.C. §1983, the issue Acadia raises as to whether it was a state actor was not an issue actually reached by the lower courts, and Petitioners did not directly raise and fully brief that issue in their Petition. Petitioners would be happy to brief this Court or to accept remand on that issue. Nevertheless, Acadia's reliance on *Mann v. Hillsborough County Sheriff's Office*, 946 F. Supp. 962 (M.D. Fla. 1996), is misplaced. In *Mann*, the deciding factors for the District Court not to find state action in that routine (non-discriminatory) landlord-tenant dispute were stated as follows:

> It must be noted that the Creasys changed the locks and took pictures inside the Mann's home without the presence or aid of the deputies. Furthermore, as they had keys to the house and the Manns were not present when they entered the house, the deputies did not effectuate the entry into the home. In addition, as

> the Creasy's changed the locks without the presence of the deputies, thus denying the Plaintiff reasonable entry, the deputies did not effectuate the wrongful eviction.

Id. at 968. Here, the City of Titusville police officers did effectuate the ejectment of the Edwardses under express threat of arrest. Furthermore, the police officers did effectuate the banishment of the Edwardses from the Mall for two years, again by express threat of arrest upon the Edwardses' premature return.

In addition, unlike the deputies in *Mann*, the City of Titusville police stated that they had to do whatever the property owner told them to do. Also, it was necessary for the City of Titusville to act in rescinding the trespass order. Moreover, the issue of the underlying racial discrimination and related retaliation that is at issue in the instant case was not the issue in *Mann*. Thus, material differences exist between the facts in *Mann* and in the instant case.

III. BOTH DEFENDANT'S ARGUMENTS THAT THIS COURT SHOULD NOT APPLY ITS ANALYSIS FROM RICHARDSON V. MCKNIGHT TO PRIVATE ENTITIES ACTING AS STATE ACTORS WITH RESPECT TO CUSTOM, POLICY, OR PRACTICE ANALYSIS UNDER SECTION 1983 SHOW WHY THIS COURT SHOULD GRANT CERTIORARI FOR THIS ISSUE.

In *Richardson v. McKnight*, 521 U.S. 399 (1997), this Court held that private entities acting in the role of state actors should not be protected by qualified immunity. For the same reasons articulated in *Richardson*, Petitioners argue that private entities acting in the role of state actors

should not be given the protection granted to local government entities regarding vicarious liability in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Acadia argues that the Eleventh Circuit and "most other circuits" agree that a private entity acting as a state actor is entitled to the vicarious liability protections granted to local governments in *Monell*. However, those cases rely on qualified immunity rationales that have been discredited by *Richardson*. Thus, this Court should grant certiorari review because the cases alluded to by Acadia are in conflict with this Court's reasoning in *Richardson*.

Conclusion

This Court should grant certiorari review to decide the issues presented in the Petition for Writ of Certiorari.

Respectfully submitted,

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August 7, 2002